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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 258

MORRIS H. KRAMER,

Appellant,

against

UNION FREE SCHOOL DISTRICT No. 15, RAYMOND S. BARON, JESSE CESTARI, RALPH J. EDSEL, J. GIBSON FRUIN, HARDON DEIXEL, ELLIOT A. NORWALK, and HAROLD S. ROSENFELD,

Appellees,

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Intervenor-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR NEW YORK ATTORNEY GENERAL, INTERVENOR-APPELLEE

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The Attorney General of the State of New York, has been an intervenor (pursuant to New York Executive Law § 71) in this litigation since its inception.

Question Presented

The question presented is whether New York Education Law § 2012, which restricts the right to vote in school district elections to persons *in loco parentis* and to classes of persons most directly subject to school district taxes, violates the Equal Protection Clause of the Fourteenth Amendment.

ARGUMENT

New York Education Law, § 2012, in restricting the right to vote in school elections to those primarily interested in such elections, provides a reasonable classification which does not violate the equal protection clause.

(1)

The appellant concedes (pp. 5-6) that the States need not provide for the election of school boards. *Sailors* v. *Board of Education,* 387 U. S. 105 (1967).

In his jurisdictional statement (p. 7), appellant insisted that elections of school boards having been provided for in certain localities in New York, this Court's decisions in *Carrington* v. *Rash,* 380 U. S. 89 (1965) and *Harper* v. *Virginia State Board,* 383 U. S. 663 (1966), had abrogated any standards of "rationality" that might be employed by New York or any other State in classifying persons eligible to vote in a school district election.

The appellant had overstated his case. In *Carrington,* the majority explicitly recognized that Texas had "unquestioned power to impose reasonable residence restrictions on the availability of the ballot" (380 U. S. 89, 91). This Court merely held it to be an *invidious discrimination* for Texas to provide that no serviceman could ever acquire a voting residence in the State so long as he remained in service (380 U. S. 89, 92, 96). Indeed, the

majority of this Court took pains to "emphasize that Texas is free to take reasonable and adequate steps, as have other States, to see that all applicants for the vote actually fulfill the requirements of bona fide residence" (380 U. S. at p. 96).

In *Harper* (*supra*), this Court held a poll tax to be unconstitutional. The "affluence of the voter or payment of any fee" were held to be inappropriate standards which bore no relation to voter "qualifications" and were offensive, as "invidiously discriminating" against those persons required to demonstrate such affluence or to pay such fee (383 U. S. 663, 666, 667). But the Court recognized that the States still had an interest in fixing qualifications which were "germane to one's ability to participate intelligently in the electoral process" (383 U. S. at p. 668).

What the appellant had failed to observe with reference to "qualifications" is that there is a very reasonable relationship, in the categories of "interest" established under Education Law § 2012 of the persons permitted to vote for the members of the school board, to the administrative functions of a local school board. Those permitted to "have a voice" in the election are those whom the State could understandably deem to be the most intimately interested in actions taken by the school board—1) the parents of children attending school in the district, and 2) the real estate owners and lessees "liable to taxation for school purposes."

This is not a "one man, one vote" case, one involving a vote dilution problem; but a "qualification" case involving intensity or depth of interest as a proper standard for the qualification of a voter in the election of local officials performing an administrative task of special interest to those qualified voters. In *Sailors* v. *Board of Education*, 387 U. S. 105, 111, this Court observed that a State could appoint such officials or elect them or combine the elective and appointive systems. In this "right to vote" case,

there appears to be no basis for challenging the reasonableness of election standards which restrict that right to those persons most directly affected and those deemed to be most directly concerned by the actions of the local administrative body. Indeed, this Court, in sustaining a *residence* requirement as a reasonable type of election "qualification", has demonstrated the propriety of State action in insisting upon an intimacy of interest in the subject matter of an election, as a basis for classification. *Pope* v. *Williams,* 193 U. S. 631, 632 (1904); *Lassiter* v. *Northampton Election Bd.,* 360 U. S. 45, 51 (1959). Furthermore, no substantial federal question was found to exist even where the classification of persons permitted to vote in a municipal election was extended to *non-resident* owners of real property in the municipality. *Spahos* v. *Mayor and Councilmen of Savannah Beach,* 207 F. Supp. 688 (So. Dist., Ga., 1962), aff'd *per curiam* 371 U. S. 206 (1963); and see *Glisson* v. *Mayor and Councilmen of Town of Savannah Beach,* 346 F. 2d 135 (5th Circ., 1965). The broad and pervasive general interest of all United States residents and citizens in the subject of education does not and need not, however, make all such residents and citizens eligible to vote in every local school district election.

The 1967 New York Constitutional Convention, whose work was rejected by the voters of the State, proposed a broad reclassification (Article II) of the rights of persons to vote in various types of elections throughout the State, including school board elections. But the 1967 voter response, rejecting the entire product of the Convention submitted to it on a take-it-or-leave-it-all basis, did not and does not prevent the Legislature from exercising its wisdom to readjust the classifications of voters it deems entitled to vote in school district elections. See Report No. 4 dated March 4, 1967, entitled "The Right to Vote", prepared by the Temporary State Commission on the Constitutional Convention. Indeed, by L. 1968, ch. 730, effective June 16, 1968, the right to vote in school district

elections has been extended, during the pendency of this action, to the "spouse of one who leases, hires or is in possession under a contract of purchase".

(2).

The appellant now makes no such direct attack upon the "reasonableness" of New York's classification. He now merely asserts that "where voting rights are involved any restrictions must be closely scrutinized" (Brief p. 7). Appellant's close scrutiny becomes dogmatic, however, when he further asserts that the interest of those restricted from voting "clearly outweighs any possible interest the State may have in restricting voting as it has done" (Brief p. 8). To avoid the appearance of being completely dogmatic in his conclusion as to the weight to be given to the factors he has so arbitrarily balanced, the appellant refers to recent turbulence, tensions and the New York City school strikes which have affected "the community in the conduct of its schools" (Brief pp. 8-9). These circumstances do not constitute "close scrutiny". Indeed, the appellant, in referring to these extra-record considerations, has completely overlooked the fact that these same circumstances might reasonably lead legislators to avoid school rule by "mass demonstration." Or it might equally reasonably lead legislators to conclude that even residence and age requirements (not challenged by the appellant) should be altered.*

Finally, appellant urges that even if the element of "interest" in actions taken by a school board were to be eliminated from consideration, he would have an absolute right to vote, since "voting is a matter of right and not

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* We shall seek to avoid complication of this brief by any consideration of the many problems and factors that may require evaluation by the Legislature in the resolution of the New York City school decentralization situation.

of interest" (Brief p. 10). Appellant relies upon *Reynolds* v. *Sims,* 377 U. S. 553, 555 (Brief p. 10), a case which we know to have dealt with the problem of the dilution of voting power, rather than that of voting qualifications. Then, rather inconsistently, appellant recognizes again that the "right to vote" may be qualified by "reasonable citizenship, age, residency and literary requirements" (Brief p. 10). Thus, he concedes that the "right" to vote is not absolute.

New York has been altering its approach to the significance to be attributed to property ownership in the evaluation of voting qualifications. This altered approach has not only been shown judicially, as in *Landes* v. *Town of North Hempstead,* 20 N. Y. 2d 417 (1967), but also legislatively, in the elimination of property ownership as a qualification for voting or for other public service. See L. 1967, Ch. 49 (jurors) L. 1968, Ch. 730 (spouse of tenant, re school district election); and L. 1968, Ch. 767 (re eligibility for town and village office); and *supra* (p. 4).* But the task of making judgments as to reasonableness; and of balancing the interest of the community in the maintenance of orderly school district elections against the interest of any individual in voting in such elections should clearly remain with the Legislature. It must continue to be the reasonable appraiser of the qualifications of voters.

Unless the Legislature is permitted to set up reasonable qualifications for voters, the floodgates will be lowered to permit a torrent of possibilities that can breed chaotic conditions in the conduct of elections. An eight-year-old California student may contemplate moving into appellee's school district; an up-state apple picker may take up

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* The New York Attorney General has been endeavoring to procure the elimination of property qualifications from an assortment of New York Statutes, 159 N.Y.L.J. (No. 14), front page, January 19, 1968. See Appendix to this brief, constituting our memorandum in support of L. 1968, Ch. 767.

temporary summer employment in the district, with the fervent hope that the school children in the district are being inculcated with educational principles that do not provide for his scalping or mutilation during the period of his temporary employment in the district; or a New Jersey mother may desire to vote more funds for the improvement of education in this district, so that it will be advantageous to move into the district with her progeny at a future date.

Some day the Legislature may deem it appropriate to permit anyone who takes the trouble to evince an interest in the outcome of a school board election to the extent of appearing at the polls on election day, to vote in such an election. Until the Legislature decides that such a display of interest is sufficient, the Legislature should not be deprived of its power to evaluate reasonable qualifications for school board elections.

POINT TWO

The reasonableness of New York's classification of school district voter's qualifications finds ample support in the opinions of the many federal judges who have passed upon this cause of action.

We may summarize the various District and Court of Appeals views outlined below as indicating a general conclusion that New York's classification has a reasonable basis. Only the dissenting opinion by Judge Weinstein, in his finding that the classification did not meet the stricter standards of classification he deemed applicable to voting rights cases, contains a contrary conclusion.

(1)

The District Court, upon the plaintiff's application to convene a three-judge court, denied that application upon the ground that the "distinctions drawn by the legislature

of the State in § 2012 of the New York Education Law are so clearly reasonable and plaintiff's claim so obviously without merit that it can only be characterized as frivolous" (ZAVATT, Ch. J., Appendix, p. 17).

(2)

The Court of Appeals, upon reversal of the District Court order declining to convene a three-judge court, merely held that the question presented was not "frivolous." Circuit Judge HAYS, however, writing for reversal, took pains to "express no view as to what should be the ultimate disposition of plaintiff's claim" (App., p. 21); holding merely that he did not consider "frivolous" the claim that an unreasonable discrimination resulted from a voter classification system "which disregards plaintiff's interest in issues of public education while recognizing a taxpayer's economic interest" (App., p. 22).

The Court of Appeals declined to hold that the decision in *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966), which involved voter qualifications for statewide elections, controlled this case "which is concerned with local elections on limited issues" (App., p. 22). In holding the issue presented not to be "frivolous", Judge HAYS merely observed that public education was "a matter of general concern to all citizens" and it was "not self-evident that the right to vote on questions of public education can properly be denied to others while permitted to parents and to those having school children living with them" (App., p. 23).

Circuit Judge KAUFMAN, although concurring with Judge HAYS that the question presented was not "insubstantial", cautioned that "it should not be inferred from my concurrence in the result that I believe the converse is true and that I view appellant's claim as meritorious" (App., p. 24).

Chief Judge LUMBARD dissented from the reversal order, stating that he saw "no need for three judges to consider a claim so patently without merit" (App., p. 25). He deemed it a sufficient answer to plaintiff's claim that (App., p. 26):

> "New York's conclusion that parents and taxpayers are more vitally interested in the administration of public schools than others is plainly not arbitrary; for example, these groups, and generally no others, have been accorded standing in the federal courts to challenge the operation of the public schools. See *Doremus* v. *Board of Educ.*, 342 U. S. 429, 72 S. Ct. 394, 96 L. Ed. 475 (1952)."

After distinguishing this Court's decision in *Harper* (383 U. S. 663, *supra*), Chief Judge LUMBARD further wrote (App., p. 30):

> "we do no service to anyone by dignifying a claim so patently without merit by requiring three judges to convene and consider it, simply because my brothers do not think it insubstantial. As another panel of this court recently said, 'When the single district judge has denied the injunction and three circuit judges are convinced that the pleadings show the claim to lack merit, they accomplish little save elegantia juris by reversing because they are not completely certain that the lack was so obvious as to have warranted dismissal by one judge rather than three.'" *Green* v. *Board of Elections*, 2 Cir., 380 F. 2d 445 (June 13, 1967).

The implication of the last quoted statement is that the Court of Appeals, if it had been passing on the merits of plaintiff's claim, would have concluded that the complaint herein should have been dismissed.

(3)

Two of the three members of the three-judge panel also concluded that plaintiff's claim lacked merit. Circuit Judge Moore and District Judge Bartels wrote (App., p. 38):

> "The defendants argue that it is not unreasonable for the legislature to determine that the local school system should be run by those who have a direct interest in it, namely, those who have to pay for it and those who benefit from its services. We are of the opinion that this argument is well taken when applied to the narrow issue before us—the denial of the franchise to those school district residents whose interest in educational policy and the financing thereof is at best indirect and weak, compared to the concern of those who are franchised."

They further observed (App., p. 39):

> "The quality of public education is controlled in large part by the personal interest of those members of the community who are most vitally affected thereby. The group most interested should be the parents."

They also noted these facts (App., pp. 39-40):

> "The geographic areas in which the Section 2012 school districts function differ substantially from those of the large cities where there are no Board of Education elections. In the smaller communities, there should be found a greater identity of interest with education on the part of the parent and taxpayer groups, the parents because of their supervision over their children, and the taxpayers because of their responsibility for the school capital and operating budgets. Persons in plaintiff's category obviously

> do not have the same permanency of attachment or interest in the school district as those in the other categories."

They concluded (App., pp. 40-41):

> "schools are erected and operated primarily for the education of children, and parents and those closely allied to the community by leases or property ownership are obviously the most interested and affected. The right of suffrage may be limited where the rationale of the exclusion is so directly related to the objective to be achieved. See *Lassiter* v. *Northampton County Bd. of Elections*, 360 U. S. 45 (1959); *Pope* v. *Williams*, 193 U. S. 621 (1904). Therefore, the Legislature, in acting within its power to fix voter qualifications, did not discriminate in an unreasonable or unrealistic manner. Quite to the contrary, the selection of the parent and taxpayer groups definitely would appear to be within the permissive limits of power still preserved by state legislatures as specified both by the Supreme Court and the New York Court of Appeals."

The dissenting District Judge (WEINSTEIN, D. J.) wrote a long opinion against dismissal of the complaint herein, predicated upon the proposition that local school boards exercise a considerable portion of governmental power and that plaintiff was being "excluded from participation in control of this locus of governmental force" (App., p. 43).

Judge WEINSTEIN viewed the reapportionment cases, *Harper* and *Carrington* as making it "clear that equal protection requires a higher standard for classifications denying or diluting a citizen's vote than has traditionally been required for legislative classifications involving less fundamental political matters" (App., p. 55). He then analyzed the distinctions made under section 2012 and found them to be arbitrary, because: 1) they discriminated against non-parents who did not either own or rent prop-

erty (App., p. 56); and against parents whose children did not meet the statute's requirements of attendance in the district's public schools (App., p. 59); 2) the overall scheme was improper; and 3) the plaintiff had no adequate remedy by way of securing the repeal of Section 2012, since the section applies only to one-third of the State's school districts and most citizens in the districts to which the section applies are entitled to vote (App., pp. 61-62).

Judge Weinstein further wrote (App., p. 63) that, despite an earlier New York decision sustaining the state constitutionality of Section 2012 in *Turco* v. *Union Free School Dist. No. 4*, 43 Misc. 2d 367, aff'd 22 A. D. 2d 1018 (2d Dept., 1964), *app. dism.* 15 N. Y. 2d 967 (1965), the recent decision in *Landes* v. *Town of North Hempstead*, 20 N. Y. 2d 417, "suggests that New York's highest court is ready to find that New York's Constitution outlaws property qualifications for voters". The *Turco* decision has not, however, been overruled. Moreover, it should be noted, that the dissenting District Judge had previously written (Weinstein, "The effect of the federal reapportionment decisions on counties and other forms of municipal government", 65 Col. L. Rev. 21, 35):

> "There remain, however, some troublesome questions in school districts where voting is restricted to homeowners, or to home-owners and parents. Can the tenant without children object on the ground of lack of equal protection? Can the parent object to the childless homeowner's vote on the ground that a nonuser of the service is exercising control? Can the voter without children object that a non-homeowning parent is not paying for the service while exercising control? While all of these questions are interesting, most courts would probably reject such possible lines of attack out of hand."

In this same law review article, written in 1965, the dissenting judge had also recognized that "Representation in proportion to population presents an issue different from

limitations on the right to exercise the franchise'' (65 Col. L. Rev: 21, 35, footnote 58).

(4)

When so many federal judges (the two majority judges below, Circ. Judge Moore and District Judge Bartels; Chief Judge Lumbard of the Court of Appeals and Chief District Court Judge Zavatt, in express terms; as well as Court of Appeals Judge Kaufman, at least, by implication) have been able to find a rational basis for a statutory classification, it would seem inappropriate for this Court to hold the classification to have been adopted with no rational basis. *McGowan* v. *State of Maryland,* 366 U. S. 420, 425-426 (1961).*

CONCLUSION

The judgment appealed from should be affirmed.

Dated: New York, New York, December 20, 1968.

Respectfully submitted,

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* Since the appellant presented no First Amendment questions in his complaint (Appendix, p. 6), we do not regard it as strange that appellant (Brief, p. 11) has shown such meagre interest in the suggestion by the dissenting judge below that First Amendment rights are impaired by Education Law, § 2012. Until a different suit is instituted testing such a theory, we shall refrain from discussing the merits of the suggestion made by District Judge Weinstein.

APPENDIX TO BRIEF

Memorandum of State Department of Law.

McKinney's Session Law News
July 25, 1968—No. 6, pp. A-160-161

This bill amends § 23 of the Town Law to eliminate the present requirement that every elective town officer at the time of his election and throughout his term of office must be the owner of record of real property in the town. It also repeals § 23-a of that law, which section now sets forth the manner of proving ownership of real property. Both of these sections were declared unconstitutional by the Court of Appeals in the recent case of *Landes* v. *Town of North Hempstead,* 20 N. Y. 2d 417, 284 N.Y.S. 2d 441, 231 N. E. 2d 120 (1967), in which the Court of Appeals stated in part "* * * it is impossible today to find any rational connection between qualifications for administering town affairs and ownership of real property."

The bill also amends § 175, subd. 3, of the Town Law to remove the real property ownership requirement for holding the office of fire district commissioner, treasurer and secretary, and Section 211 thereof to remove the property ownership requirement to be commissioner of a special district.

Also amended by this proposal is § 4-404, subd. 1, of the Village Law to remove the property ownership requirement for mayor, trustee, member of any board of commission of a village, and Chapter 595 of the Laws of 1938 (See McKinney's Unconsolidated Laws, § 5854) to remove the real property ownership requirements for special fire districts.

Memorandum of State Department of Law.

Villages and special districts, including fire districts, would seem to be in the same classification as towns where the Court of Appeals declared unconstitutional a property ownership requirement to hold office. School districts have not been included in this bill because there are two alternatives to a property ownership requirement for holding office, namely, that of being a renter or the parent of a child in school. There is no indication whether the Court of Appeals would decide these requirements to be unconstitutional, whereas for the villages and districts covered by this bill it is reasonable to anticipate that the Court of Appeals would declare the property ownership requirements unconstitutional if the Legislature does not eliminate such requirements.

This bill is part of the legislative program of the Attorney General.